BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal )
of )
ANDERSEN-CARLSON MANUFACTURING COMPANY )

Appearances:

For Appellant: Walter G. Danielson and H. Spencer St. Clair, Attorneys at Law

For Respondent: Burl D, Lack, Chief Counsel; Hebard P. Smith, Associate Counsel

## O P I N I O N

This appeal is made pursuant to Section 27 of the Bank and Corporation Franchise Tax Act (now Section 26077 of the Revenue and Taxation Code) from the action of the Franchise Tax Board in denying the claim of Andersen-Carlson Manufacturing Company for a refund of tax in the amount of $5,305.37 for the taxable year 1950.

Appellant, a California corporation, entered into a written agreement with Rome Cable Corporation, a New York corporation, on July 9, 1948, granting to the Rome Cable Corporation an irrevocable option to purchase at any time on or before January 15, 1950, all of the assets of Appellant, excepting the sum of $2,500. The agreement provided for the assumption by Rome Cable Corporation of all of the liabilities of Appellant and the issuance of 25,000 shares of

Rome Cable Corporation common stock to the Appellant, subject to certain modifications as to the amount of stock to be issued. On October 6, 1949, Rome Cable Corporation gave notice to Appellant of its election to exercise the option and set January 3, 1950, as the date for closing the transaction. On that day Appellant transferred all of its assets (excepting $2,500) by deed, bill of sale and assignment to Rome Cable Corporation, and that company issued to Appellant 27,500 shares of its common stock and assumed the liabilities of Appellant as set forth in its balance sheet of September 30, 1949, together with such additional liabilities as were incurred thereafter in the ordinary course of Appellant's business. Thereafter the business and properties of Appellant were operated by Rome Cable Corporation as part of its own business. The shares of common stock of the Rome Cable Corporation received by Appellant, which constituted approximately 7% of the common stock of Rome Cable Corporation, were distributed by Appellant to its stockholders in exchange for its own stock and, on March 15, 1950, Appellant's final certificate of dissolution was filed with the Secretary of State of California.

On or about February 10, 1950, Appellant filed its franchise tax return for the taxable year 1950 and paid the tax shown thereon to be due in the amount of $5,305.37, based upon its income for the income year 1949. On May 1, 1950, Appellant filed a claim for refund of the full amount of the tax under the provisions of Section 13(k) of the Act

(now in Sections 23331-23333 of the Code) on the ground that it did not do business during the year 1950 and finally and completely dissolved on March 15, 1950. Appellant, for the purpose of this appeal, concedes an obligation to pay the franchise tax for the period preceding dissolution and seeks only to recover 10/12ths of the tax paid for the taxable year. The Franchise Tax Board denied the claim for refund on the ground that Appellant's dissolution was pursuant to a reorganization within the meaning of Section 13(j)(3) of the Act (now in Section 23251 of the Code), and, therefore, no refund was allowable under Section 13(k)(1) of the Act (now in Section 23332 of the Code),

Section 13(k)(l) of the Act as applicable to the years involved herein read in part as follows:

> "(k)(l) Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the, months of such taxable year which precede the effective date of such dissolution or withdrawal, according to or measured by (A) the net income of the preceding income year or (B) a percentage of such net income determined by ascertaining the ratio which the months of the taxable year, preceding the effective date of dissolution or withdrawal, bears to the months of such income year, whichever is the lesser amount; provided, however,*** that the taxes levied under this act shall not be subject to abatement or refund because of-the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger.***"

Section 13(j) of the Act as applicable herein reads as follows:

> "(j) The term 'reorganization' as used in this section means (1) a transfer by a bank or corporation of all or a substantial portion of

> its business or property to another bank or corporation if immediately after the transfer the transferor or its stockholders or both are in control of the bank or corporation to which the assets are transferred; or(2)a mere change in identity, form or place of organization however effected; or (3) a merger or consolidation; or (4) a distribution in liquidation by a bank or corporation of all or a substantial portion of its business or property to a bank or corporation stockholder, and the bank or corporation stockholder continues all or a substantial portion of the business of the liquidated bank or corporation. As used in this paragraph the term 'control' means the ownership of at least 80 percent of the voting stock and at least 80 percent of the total number of shares of all other classes of stock of the bank or corporation."

If the transaction involved herein constituted a reorganization, as contended by the Franchise Tax Board, Appellant is not entitled to a refund of any portion of its tax. Appellant contends, however, that the transaction was not a reorganization but constituted a sale of its entire assets to Rome Cable Corporation in exchange for stock of that company.

In San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254, the California Supreme Court held that a liberal rather than a strict construction should be applied in the interpretation of the terms reorganization, merger and consolidation under Subsections (j) and (k) of Section 13, and that consolidation or merger as a form of reorganization under Section 13(j), supra, is not restricted to statutory consolidation or merger.

As the Court pointed out in that case (p. 262), Subsections (1), (2) and (3) of Section 13(j), suprn, were

patterned after the definition of reorganization in Section 112 of the Federal Revenue Act of 1928. The court discussed the fact that the California Legislature did not adopt the language of the parenthetical phrase of clause (A) of the federal definition which defined reorganization as "(A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation, to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." It held that this omission of an express declaration that merger or consolidation should include the transfer by one corporation to another of its voting stock or properties does not require a conclusion that it was the legislative intention to exclude elements of a de facto merger or consolidation from the meaning of reorganization. Supporting its conclusion with numerous federal cases construing the analogous, although not identical, federal legislation, the Court held that the appropriate rule of interpretation required a holding that the language of Section 13(j), supra, was sufficiently broad to include as a reorganization any transaction which did not substantially

change the continuity of interest.

The United States Supreme Court has held that a transfer by one corporation of substantially all of its assets to another corporation for stock of the latter and cash constituted reorganization under Clause (A) of Section 112(i)(l) of the Act of 1928 (or identical language in predecessor acts), provided the transferor received an interest in the affairs of the transferee which represented a material part of the value of the transferred assets. Helvering v. Minnesota Tea Company, 296 U. S. 378; John A. Nelson Company v. Helvering, 296 U. S. 374. In the latter case the Court held that a controlling interest in the transferee corporation is not made a requisite by the statute.

Appellant argues that the view that a transfer of all, or substantially all, of the assets of a corporation for stock in another corporation followed by a dissolution of the transferee constitutes a merger, regardless of whether or not the transferor or its stockholders are in control of the transferee, denies any effect or validity to Subsection 1 of Section 13(j) supra. This argument in respect to Clause (B) of Section 112(i)(l) of the Federal Act which corresponds to Subsection 1 of Section 13(j), supra, was refuted in both of the last-cited cases. In the Minnesota Tea Company case, supra, the Court stated:

> "We find nothing in the history or words employed which indicates an intention to modify the evident meaning of (A) by what appears in (B). Both can have effect, and if one does somewhat overlap the other the taxpayer should not be denied, for that reason, what one paragraph clearly grants him. *** "

The effect of the transaction in question was that Appellant's stockholders exchanged their stock in Appellant for stock in Rome Cable Corporation which continued to operate the business formerly operated by Appellant. The continuity of interest of such stockholders was the same as it would have been had Appellant been absorbed by Rome Cable Corporation as the result of a statutory merger, It appears obvious, therefore, that Appellant's contention that the transaction did not constitute reorganization rests entirely on matters of form. In this regard it should suffice to say that under the rule of San Joaquin Ginning Co. v. McColgan, supra, the terms reorganization, merger and consolidation are to be given a liberal interpretation to effectuate the legislative purpose. We conclude, accordingly, that the action of the Franchise Tax Board in denying Appellant's claim for refund should be sustained.

## O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED pursuant to Section 26077 of the Revenue and Taxation Code that the action of the Franchise Tax Board in denying the claim of Andersen-Carlson Manufacturing Company for a refund of tax in the amount of $5,305.37 for the taxable year 1950 be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of February, 1953, by the State Board of Equalization.

Wm. G. Bonelli, Chairman

J. H. Quinn, Member

Paul R. Leake, Member

Geo. R. Reilly, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary